Beli ak Empoi & Ors v Sarku Engineering Services Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–2529–10 OF 2011
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
2 JANUARY 2015

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Labour Law — Employment — Dismissal — Dismissal without just cause or excuse — Industrial Court's Award — Backwages — Judicial review — Backwages reduced on basis of length of service — Appeal against — Whether trial judge erred in reducing award of backwages — Whether warranted appellate intervention

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The appellants appealed against the decision of the High Court in a judicial review which held, inter alia, that the backwages to be paid to Beli ak Empoi, Nyanggau ak Tambi and William ak Rambor be reduced to nine months, six months and six months, respectively. The claim by the appellants before the Industrial Court was that they were dismissed without just cause or excuse. The Industrial Court found in favour of the appellants and awarded them 24 months' backwages with a deduction of 20% of amount awarded to each appellant for post-dismissal earnings. The respondent's judicial review application was allowed with respect to the award of backwages which was reduced on the basis of the length of service. It was submitted for the appellants that the High Court misdirected itself when it reduced the backwages by taking into account the lengths of employment of the appellants with the respondent company. The issue for the determination of this court was whether the High Court erred in reducing the award of backwages from that made by the Industrial Court.

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Held, allowing the appellants' appeal with costs:

(1) The principle for an award of backwages was that the worker would be earning his usual wage with the employer if it were not for the wrongful dismissal. The basic approach in awarding backwages has been that it is arrived at by multiplying his monthly remuneration with the number of months between the date of his dismissal and the date of the award and there is a general practice of limiting the award of backwages to 24 months in line with Industrial Court Practice Note No 1 of 1987 (see paras 8–9).

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(2) The Industrial Court had already taken into account the relevant mitigating circumstances when it reduced the 24 months backwages it allowed by 20%, it was unnecessary to consider an award beyond 24 months. The respondent's submission that the High Court erred in upholding the finding or decision of the Industrial Court in awarding backwages were mere assertions that provided no reasons. Accordingly, no merits had been advanced for consideration (see paras 10–11).

[Bahasa Malaysia summary

Perayu-perayu merayu terhadap keputusan Mahkamah Tinggi dalam semakan kehakiman yang mana memutuskan, antara lain, bahawa gaji tertunggak hendak dibayar kepada Beli ak Empoi, Nyanggau ak Tambi dan William ak Rambor dikurangkan masing-masing kepada sembilan bulan, enam bulan dan enam bulan. Tuntutan oleh perayu di hadapan Mahkamah Perusahaan adalah bahawa mereka dibuang kerja tanpa sebab dan alasan adil. Mahkamah Perusahaan memutuskan memihak kepada perayu-perayu dan mengawardkan mereka gaji tertunggak 24 bulan dengan pengurangan sebanyak 20% daripada jumlah yang diawardkan kepada setiap perayu untuk pendapatan selepas dibuang kerja. Permohonan semakan kehakiman responden dibenarkan berkaitan award gaji kebelakangan yang mana dikurangkan atas dasar tempoh perkhidmatan. Ia dihujahkan untuk perayu bahawa Mahkamah Tinggi tersalah arah dirinya apabila ia mengurangkan gaji kebelakangan dengan mengambil kira tempoh pekerjaan perayu-perayu dengan responden. Isu untuk penentuan mahkamah ini adalah sama ada Mahkamah Tinggi tersilap dalam mengurangkan award gaji kebelakangan yang dibuat oleh Mahkamah Perushaaan.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Prinsip untuk award gaji tertunggak adalah bahawa pekerja akan memperoleh pendapatan gaji biasanya dengan majikan jika bukan kerana pembuangan kerja salah. Pendekatan asas dalam mengawardkan gaji tertunggak bahawa ia dicapai dengan mendarabkan gaji bulanannya dengan bulan-bulan di antara tarikh pembuangan kerjanya dan tarikh award tersebut dan terdapat amalan am menghadkan award gaji tertunggak kepada 24 bulan selaras dengan Nota Amalan No 1 Mahkamah Perusahaan 1987 (lihat perenggan 8–9).

(2) Mahkamah Perusahaan telah mengambil kira keadaan peringanan relevan apabila ia mengurangkan 24 bulan gaji tertunggak sebanyak 20%, adalah tidak perlu untuk mempertimbangkan award melampaui 24 bulan. Hujahan responden bahawa Mahkamah Tinggi tersilap dalam mengesahkan dapatan atau keputusan Mahkamah Perusahaan dan mengawardkan gaji kebelakangan adalah semata-mata dakwaan semata-mata yang tidak memberikan alasan-alasan. Dengan itu, tiada merit telah dikemukakan untuk pertimbangan (lihat perenggan 10–11).

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 1144–1222.

Cases referred to

Nestle Food Storage (Sabah) Sdn Bhd v Terrence Tan Nyang Yin [2001] ILJU 33; [2002] 1 ILR 280, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Telekom Malaysia Bhd v Ramli bin Akim [2008] 1 MLJ 770; [2008] 1 CLJ 440, CA (refd)

Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor [1997] 3 MLJ 735, HC (refd)

Appeal from: Application for Judicial Review No MR-JR-2 of 2011 (High Court, Miri)

Mekanda Singh Sandhu (Kalveet Singh Sandhu with him) (Sandhu & Co) for the appellants.

Sylvia Robin Anyi (Ariffin, Lai & Kan) for the respondents.

Abdul Wahab Patail JCA:

[1] The respondents in the High Court, Beli ak Empoi, Nyanggau ak Tambi and William ak Rambor ('the appellants') appealed to this court against the decision of the High Court in judicial review holding that the backwages to be paid to the appellants be reduced to nine months, six months and six months respectively.

[2] A cross-appeal by the applicant in the High Court, Sarku Engineering Services Sdn Bhd ('the respondent') to seek a variation from the decision of the High Court was withdrawn. The appeal was, therefore, struck out and we fixed costs in the sum of RM5,000.

BACKGROUND

[3] The claim by the appellants before the Industrial Court was that they were dismissed without just cause or excuse. The Industrial Court held that the appellants were dismissed without just cause and excuse and awarded the appellants 24 months' backwages with a deduction of 20% of amount awarded to each appellant for post-dismissal earnings.

[4] The respondent applied for judicial review. The High Court found that there was no justification to intervene into the finding of the Industrial Court

that the dismissal of the appellants was without just cause in excuse, but reduced the award of backwages on the basis of the length of service.

[5] With the withdrawal of the cross-appeal, the sole remaining issue is whether the High Court erred in reducing the award of backwages from that made by the Industrial Court.

[6] The Industrial Court had held that it was appropriate to order reinstatement and applied the Industrial Practice Note No 1 of 1987 and maximised backwages to 24 months subject to a deduction of 20% for post dismissal earnings instead of awarding compensation in lieu of reinstatement for each year of service in view of the nature of employment which was intermittent.

[7] It was submitted for the appellants that the High Court misdirected itself when it reduced the backwages by taking into account the lengths of employment of the appellants with the respondent company.

[8] In *Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor* [1997] 3 MLJ 735, it has been explained that the principle for award of backwages was that the worker would be earning his usual wage with the employer if it were not for the wrongful dismissal. In *Nestle Food Storage (Sabah) Sdn Bhd v Terrence Tan Nyang Yin* [2001] ILJU 33; [2002] 1 ILR 280, it was explained by the Industrial Court in respect of the Industrial Practice Note No 1 of 1987 that:

> to strike a right balance between the interests of the parties. It takes into account a realistic and reasonable time frame for the workman to recover from the set back of his dismissal and to be restored to his earning capacity prior to his dismissal. It also takes into account the justifiable concern that delay in the statutory process of conciliation, reference and adjudication should not inflate the quantum of backwages awarded and unduly penalize an employer by exorbitant awards which have no relationship or nexus between loss and liability.

[9] In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (FC), it was held by the Federal Court that although the Practice Note No 1 of 1987 had limited the backwages to 24 months, the courts are entitled to depart from it in a suitable case and grant the employee his full entitlement once the dismissal is found to be wrongful. In *Telekom Malaysia Bhd v Ramli bin Akim* [2008] 1 MLJ 770; [2008] 1 CLJ 440 (CA), it was held by this court that *Rama Chandran* is not an authority to support the proposition that in all cases of unfair dismissal, future loss of earnings must be awarded, and the basic approach in awarding backwages has been that it is arrived at by multiplying his monthly remuneration with the number of months between the date of his dismissal and the date of the award

and there is a general practice of limiting the award of backwages to 24 months in line with Industrial Court Practice Note No 1 of 1987.

[10] In this case, in light of the submission for the appellant that the Industrial Court had already taken into account the relevant mitigating circumstances when it reduced the 24 months backwages it allowed by 20%, it is unnecessary to consider an award beyond 24 months.

[11] The submission for the respondent in respect of the backwages was that it should not have been awarded because the High Court erred in upholding the finding or decision of the Industrial Court. The submissions for the respondent at paras 3.12–3.15 were mere assertions but provide no reasons. Accordingly, we find no merits had been advanced for consideration.

[12] Accordingly we, having heard the parties, allowed the appellants' appeal with costs fixed at RM7,500, set aside the decision of the High Court and restored the decision of the Industrial Court.

Appellants' appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed